United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2544

To be argued by
BERNARD W. NUSSBAUM

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B P/S

THE UNITED STATES CONSTITUTION,
Represented by VICTOR SHARROW,

Plaintiff-Appellant Pro Se,

-against-

SHIRLEY CHISHOLM, ROBERT F. DRINAN, JOHN DOW, HAMILTON FISH, JR., ELIZABETH HOLTZMAN, RICHARD OTTINGER, CHARLES RANGEL and PETER RODINO, JR.,

Defendants-Appellees.

BRIEF ON BEHALF OF APPELLEES
ELIZABETH HOLTZMAN AND
PETER RODINO, JR.

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BRIEF ON BEHALF OF APPELLEES
ELIZABETH HOLTZMAN AND
PETER RODINO, JR.

Statement

This brief is respectfully submitted on behalf of defendants-appellees Elizabeth Holtzman and Peter Rodino, Jr.

Plaintiff-appellant pro se Victor Sharrow ("Sharrow") -- purporting to represent "The United States Constitution" -- commenced this action on October 21, 1974 (A3)* seeking to enjoin defendants-appellees from running for election in the November 5, 1974 election for the House of Representatives. Sharrow contended that unless such injunction issued, the election would result in a House of Representatives not constitutionally apportioned in accordance with the provisions of Section 2 of the Fourteenth Amendment. After filing his complaint Sharrow applied to the Hon. Thomas P. Griesa of the United States District Court, Southern District of New York, for an order to show cause bringing on a motion for the injunctive relief demanded in his complaint and for the convening of a statutory three-judge court to pass upon his claims. This appeal is from Judge Griesa's order of October 21, 1974 (A4) declining to sign the requested order to show cause and directing that Sharrow's complaint be dismissed.

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* All references in this brief prefaced by "A" are to the "Appendix" which has been filed in this Court by appellant.

It is clear from his complaint that Sharrow did not bring this action to challenge the right of any of the candidates named as defendants to run for election to Congress based upon any failures by them to satisfy the age, residence and citizenship requirements for holding office under the Constitution. Rather, this action is only the latest vehicle employed by Sharrow in his personal campaign to force reapportionment of the House of Representatives in accordance with the computation formula which Sharrow believes to be mandated by Section 2 of the Fourteenth Amendment.*

It will be demonstrated below that Sharrow clearly lacks the required standing to seek the relief requested in his complaint; that the enforcement of Section 2 of the Fourteenth Amendment is within the discretion of the Congess and thus presents a non-justiciable political question; and that Sharrow's complaint fails to state any claim upon which relief can be granted as against defendants-appellees. Accordingly, the order appealed from must be affirmed in all respects.

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* Sharrow's previous efforts to enforce Section 2 via challenges to the census have been unsuccessful in this Court. See United States v. Sharrow, 309 F.2d 77 (2d Cir. 1962), cert. denied, 372 U.S. 949 (1963) (nothing in Section 2 required Congress to designate the census questionnaire as the means for determining whether adult males in a state are disenfranchised); Sharrow v. Brown, 447 F.2d 94 (2d Cir. 1971), cert. denied, 405 U.S. 968 (1972) (holding that Sharrow lacked standing to attack the 1970 census because he did not establish that failure to enforce Section 2 resulted in a detriment to his rights of representation in Congress). See also Sharrow v. Eisenhower, 60 Civ. 3569 (D.D.C. 1960).

Argument

THE ORDER OF THE DISTRICT MUST BE AFFIRMED

The thrust of Sharrow's present action is made clear in his "Petition of Appeal", wherein Sharrow, after contending that enforcement of the apportionment provisions of Section 2 is mandatory, argues that by reason of the alleged non-enforcement of Section 2:

> [T]here can be no doubt that all of the candidates for election to the House of Representatives did not run under a constitutional computation for apportionment, depriving all the law abiding, voting citizens of their right to vote for their correct constitutional apportionment of Representatives.
>
> --Petition of Appeal, p. 1

It is settled, that Sharrow lacks standing to assert this claim.

In Schlesinger v. Reservists Committee To Stop The War, 94 S. Ct. 2925 (1974), an anti-war group brought an action seeking to challenge the armed forces reserve membership of certain members of Congress as being violative of the Incompatability Clause of Article I, Section 6 of the United

States Constitution. They asserted that nonobservance of the Incompatability Clause deprived citizens of the faithful discharge by reservist members of Congress of their legislative duties. Thus, as with Sharrow in the present case, concerned citizens were there seeking to have the courts enforce their generalized interest as citizens in constitutional governance, which interests they claimed were being damaged by nonobservance of a constitutional mandate. The Supreme Court, however, held that citizens, no matter how sincere, do not have standing to sue based upon such abstract alleged injuries. In language clearly applicable to the present situation, the Supreme Court held that:

> [S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process,

> for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law. Only concrete injury presents the factual context within which a court, aided by the parties who argue within the context, is capable of making decisions. (Emphasis added.)
>
> --94 S.Ct. at 2932.

See also, e.g., O'Shea v. Littleton, 414 U.S. 488 (1974); Sierra Club v. Morton, 405 U.S. 727, 739 (1972); Exparte Levitt, 302 U.S. 633, 634 (1937); Lampkin v. Connor, 239 F. Supp. 757, 760-63 (D.D.C. 1965), aff'd, 360 F.2d 505 (D.C. Cir. 1966).

In the present case, Sharrow can point to no concrete injury as a basis for standing to bring this suit. His only conceivable claim is that due to non-enforcement of Section 2 the State of New York, of which he is a citizen, has been deprived of seats in the House of Representatives. In Sharrow v. Brown, 447 F.2d 94, 97 (1971), cert. denied, 405 U.S. 968 (1972), however, this Court has already held that in the absence of evidence that New York's loss of Representatives is the result of anything other than shifts in population, Sharrow is without standing to sue on his Section 2 claims. Sharrow's only "evidence" in this action is a letter from the Director of the Census to former Congressman

Ogden Reid -- a copy of which is annexed to Sharrow's complaint -- confirming that Section 2 would not be used as a basis for computing the numbers of Representatives to which the States were entitled, "inasmuch as the Congress has made no provision for implementing this Section". That same letter was submitted by Sharrow to the District Court in Sharrow v. Brown, 319 F. Supp. 1012, 1014 (S.D.N.Y. 1970), aff'd, 447 F.2d 94 (2d Cir. 1971), cert. denied, 405 U.S. 968 (1972). It did not suffice to establish "concrete injury" then and certainly can not do so now. In sum, the sincerity of Sharrow's actions and the selflessness of his motivations do not afford him standing to wage his Section 2 enforcement campaign in the federal courts. See, e.g., Schlesinger v. Reservists Committee to Stop the War, supra, at 2934; Sharrow v. Brown, supra, 447 F.2d at 97.

Moreover, since Section 5 of the Fourteenth Amendment empowers Congress to enact appropriate legislation enforcing the provisions of the Amendment, Sharrow's claim that Section 2 is mandatory and self-executing is without support. The courts that have dealt with this question have treated the enforcement of Section 2 as resting within the discretion of Congress and therefore as a non-justiciable political question. Lampkin v. Connor, 360 F.2d 505, 508-12

(D.C. Cir. 1966) ("apportionment is a duty which has been constitutionally entrusted to Congress, which has an unreviewable discretion as to how it is to be accomplished"); Saunders v. Wilkins, 152 F.2d 235, 238 (4th Cir. 1945), cert. denied, 328 U.S. 870 (1946). And this Court in United States v. Sharrow, 309 F.2d 77, 80 (2d Cir. 1962), cert. denied, 372 U.S. 949 (1963), has held that nothing in Section 2 required Congress to designate the census questionnaire as the means for determining information necessary to enforce Section 2.

Finally, if -- as he claims -- Sharrow has sued defendants-appellees Holtzman and Rodino as private citizens, his non-residence in their districts and his failure to allege that they do not personally satisfy the age, residence and citizenship standards of Article I, Section 2 of the Constitution -- the only qualifications prescribed by the Constitution for service in the House -- conclusively demonstrates that he has not stated any claim against Holtzman and Rodino upon which relief can be granted. And if Sharrow is suing Holtzman and Rodino on the ground that their actions as members of the House Judiciary Committee in not formulating legislation to enforce Section 2 are illegal or unconstitutional, as his complaint obliquely implies, then his claim must be dismissed as barred by the Speech or Debate Clause of the Constitution, Article I, Section 6. See Powell v. McCormack, 395 U.S. 486, 501-506 (1969).

The District Court properly dismissed Sharrow's complaint.

Conclusion

The order of the District Court must be affirmed in all respects.

Dated: February 3, 1975

Respectfully submitted,

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C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 74-2544

THE UNITED STATES CONSTITUTION, Represented by VICTOR SHARROW,

Plaintiff-Appellant Pro Se

against

SHIRLEY CHISHOLM, et al.

Defendants-Appellees

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Forest Hills, N.Y.

That on 3rd day of February *1975* *deponent served the annexed* two copies of Brief on Behalf of Appellees Elizabeth Holtzman and Peter Rodino, Jr. *on* Victor Sharrow, Plaintiff-Appellant pro se ~~attorney(s) for~~ *in this action at* Crompond, New York 10517 *the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

Sworn to before me

Charles D. Poret

CHARLES I. PORET
Notary Public, State of New York
No. 60-3134970 Westchester County
Cert. Filed in New York County
Commission Expires March 30, 1975

Francine Adler

The name signed must be printed beneath

FRANCINE ADLER

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF *ss.:*

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on *19* *deponent served the annexed*

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law